Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–70 OF 2009(B)
ZAKI AZMI CHIEF JUSTICE, ZULKEFLI AND GOPAL SRI RAM FCJJ
9 OCTOBER 2009

Administrative Law — Remedies — Habeas corpus — Application for — Test to be applied — Objective test — Whether act of smuggling stolen cars prejudicial to public order — Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 4(1) & 4(4) — Federal Constitution art 151(2)

The appellant was arrested pursuant to the provision of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). By an order issued under s 4(1) of the Ordinance applied by the Home Affairs Minister ('the Minister'), the appellant was detained for a period of two years. The Minister had directed the detention of the appellant to prevent him from acting in a manner prejudicial to public order. The appellant was, in accordance to s 4(4) of the Ordinance, served a statement of facts stating, inter alia, that the appellant was involved in the smuggling of stolen cars out of Malaysia. The appellant's representation to the Advisory Board under art 151(2) of the Federal Constitution was dismissed with recommendation to the Yang di-Pertuan Agong. The appellant subsequently applied for an order of habeas corpus but was declined by the High Court on the ground that the appellant's activity came within the scope of public order. Hence, this appeal.

Held, dismissing the appeal:

(1) In was insufficient if the Minister thought that he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order. The question that a court must ask itself was whether a reasonable Minister apprised of the material set out in the statement of facts objectively be satisfied that the actions of the appellant were prejudicial to public order. It is the court that was the final arbiter upon the question (see paras 5 & 7).

(2) An act of smuggling stolen cars may per se not prejudicial to public order but this was a case in which a syndicate was involved as clearly stated in the grounds of the appellant's detention. This activity had the effect of providing for thieves and would be thieves a ready market for disposal of stolen cars. Hence, the potential to disrupt public tranquility

was present as no car may be safe from being either robbed or stolen by reason of the appellant's assistance in disposal. A reasonable decision maker when faced with the facts set out in the statutory statement would have concluded that the appellant's activity was prejudicial to public order. The Minister in the present instance did not therefore commit any error of law in making the order he did (see para 13).

[Bahasa Malaysia summary

Perayu ditahan berikutan peruntukan Ordinan Darurat (Keselamatan Awam dan Pencegahan Jenayah) 1969 ('Ordinan'). Melalui perintah yang dikeluarkan di bawah s 4(1) Ordinan yang dipohon oleh Menteri Dalam Negeri ('Menteri'), perayu ditahan selama dua tahun. Menteri telah mengarahkan penahanan perayu untuk menghalangnya melakukan perkara yang menjejaskan ketenteraman awam. Perayu, menurut s 4(4) Ordinan, diserahkan pengataan fakta yang menyatakan, antara lain, bahawa perayu terlibat dalam penyeludupan kereta-kereta curi ke luar Malaysia. Representasi perayu kepada Lembaga Penasihat di bawah perkara 151(2) Perlembagaan Persekutuan ditolak dengan saranan kepada Yang di-Pertuan Agong. Perayu selanjutnya memohon suatu perintah habeas corpus tetapi ditolak oleh Mahkamah Tinggi atas alasan bahawa aktiviti-aktiviti perayu terangkum dalam skop ketenteraman awam. Maka, rayuan ini.

Diputuskan, menolak rayuan:

(1) Tidak mencukupi jika Menteri berpendapat bahawa dia mempunyai alasan-alasan munasabah yang harus dibuktikan bahawa perayu telah bertindak sehingga menjejaskan ketenteraman awam. Persoalan yang harus mahkamah fikirkan ialah sama ada seorang Menteri yang waras telah memaklumkan material yang dinyatakan dalam pengataan fakta-fakta secara objektifnya telah membuktikan bahawa tindakan-tindakan perayu menjejaskan ketenteraman awam. Mahkamahlah yang harus memutuskan secara muktamad persoalan itu (lihat perenggan 5 & 7).

(2) Tindakan menyeludup kereta-kereta curi sahaja tidaklah menjejaskan ketenteraman awam tetapi ini adalah kes di mana melibatkan suatu sindiket seperti yang jelas dinyatakan dalam alasan-alasan penahanan perayu. Aktiviti ini memberikan pencuri-pencuri atau bakal-bakal pencuri suatu pasaran yang tersedia untuk kereta-kereta curi. Oleh itu, wujudnya potensi untuk menggugat keamanan awam kerana kereta-kereta akan dirompak atau dicuri disebabkan perayu sedia membantu mereka menjual kereta-kereta tersebut. Seseorang pembuat keputusan yang wajar, apabila menghadapi fakta-fakta yang dinyatakan dalam penyataan statutori tersebut akan memutuskan bahawa aktiviti

perayu menjejaskan ketenteraman awam. Menteri dalam kes ini tidak khilaf di sisi undang-undang apabila membuat perintah tersebut (lihat perenggan 13).]

Notes

For cases on habeas corpus, see 1 *Mallal's Digest* (4th Ed, 2005, Reissue) paras 580–634.

Cases referred to

Cameron v Gibson [2005] CSIH 83 (refd)

Lim Thian Hok v Minister of Home Affairs & Anor and other applications [1993] 1 MLJ 214, HC (refd)

Menteri Hal Ehwal Dalam Negeri & Anor v Lee Gee Lam and another application [1993] 3 MLJ 673; [1993] 4 CLJ 336, SC (refd)

Merdeka University Berhad v Government of Malaysia [1982] 2 MLJ 243, FC (refd)

Tan Boon Liat @ Allen, Re application of; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 2 MLJ 83, HC (refd)

Tan Boon Liat & Ors, Re application of; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors; Patrick Eugene Long v Hal Ehwal Dalam Negeri, Malaysia & Ors; Donnie Lee Avila v Hal Ehwal Dalam Negeri, Malaysia & Ors [1977] 2 MLJ 18, FC (refd)

Reg v Secretary of State for the Home Department, ex p Khawaja and other appeals [1984] AC 74, HL (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 s 6(1)

Emergency (Public Order and Prevention of Crime) Ordinance 5, 1969 s 4(1), (4)

Federal Constitution art 151(2)

Appeal from: Criminal Application No MT2–44–127 of 2008 (High Court, Shah Alam)

P Visnuvarman (Alvinthiren & Partners) for the appellant.

Najib bin Zakaria (Legal Advisor, Ministry of Home Affairs, Malaysia) for the respondents.

Gopal Sri Ram FCJ:

[1] The appellant was arrested pursuant to the provisions of the Emergency (Public Order and Prevention of Crime) Ordinance 5, 1969 ('the Ordinance') on 4 April 2008. An order was made by the Minister under s 4(1) of the Ordinance detaining the appellant for a period of two years. A statement of

facts of the same date was served on the appellant in accordance with s 4(4). These two provisions read as follows:

4(1)If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order directing that that person be detained for any period not exceeding two years.

4(4)Whenever any person is detained under any order made under sub-section (1) he shall, in accordance with Article 151 of the Constitution, as soon as may be:

(a) be informed of the grounds of this detention;

(b) subject to Clause (3) of the said Article (which provides that no authority may be required to disclose facts whose disclosure would in its opinion be against the national interest) be informed of the allegations of fact on which the order is based; and

(c) be given the opportunity of making representations against the order as soon as may be.

[2] The appellant made representations to the Advisory Board ('the board') constituted under art 151(2) of the Constitution. After hearing the appellant's representations, the board dismissed his appeal by making the relevant recommendations to the Yang di-Pertuan Agong. The appellant then moved the High Court for an order of habeas corpus. The High Court having declined to grant the order, the appellant has appealed to us.

[3] The Minister's order makes it clear that he directed the detention of the appellant with a view to preventing him from acting in a manner prejudicial to public order. In a gist, the statement of facts on which the Minister based his order recites that the appellant was involved in the smuggling of stolen cars out of Malaysia. The statement condescends to particulars of dates and places where the appellant carried out his activities. The only issue before the High Court and before us is whether the Minister acted lawfully in classifying the activity the appellant is alleged to be involved as constituting an act prejudicial to public order. In order to deal with this issue we must address our minds to the way in which s 4(1) of the Ordinance is constructed.

[4] It is to be noted that the section says 'if the Minister is satisfied'. The first question that has to be determined is whether that phrase imports a subjective or an objective element. A similar statutory formula came up for

consideration in *Merdeka University Berhad v Government of Malaysia* [1982] 2 MLJ 243. There the words used by the statute were 'If, the Yang di-Pertuan Agong is satisfied'. In interpreting that statutory formula, Suffian LP said:

> It will be noted that s 6 used the formula 'If the Yang di-Pertuan Agong is satisfied etc.' In the past such a subjective formula would have barred the courts from going behind His Majesty's reasons for his decision to reject the plaintiff's application; but, as stated by the learned judge, administrative law has since so far advanced such that today such a subjective formula no longer excludes judicial review if objective facts have to be ascertained before arriving at such satisfaction and the test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable — see the cases cited by the learned judge at p 360.

In the same case, Abdoolcader J at first instance had this to say:

> It has been suggested in the past that the qualification of the statement of a power by introductory words in the form of a subjective formula such as His Majesty's satisfaction on the matters specified in s 6(1) of the 1971 Act might be sufficient to exclude judicial review, but the modern and correct view clearly is for an objective approach to the formula to be preferred and this means that the discretion would be reviewable and the deciding authority has in fact to have reasonable grounds and it is insufficient if he merely thinks he has reasonable grounds.

[5] Adopting this test which apart from being binding precedent is the correct statement of the law, in the present instance it is insufficient if the Minister thought that he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order. The question that a court must ask itself is whether a reasonable Minister apprised of the material set out in the statement of facts would objectively be satisfied that the actions of the appellant were prejudicial to public order.

[6] There is a principle of ancient repute that:

> ... where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will decide whether the requirement has been satisfied. *Reg v Secretary of State for the Home Department, ex p Khawaja and other appeals* [1984] AC 74, per Lord Scarman.

And as Lord Kingarth observed in *Cameron v Gibson* [2005] CSIH 83:

> Equally, the fact that the order may have been made by reason of a mistake in fact or law cannot affect the conclusion that the order was one made ultra vires … when power is given by Parliament to administrative bodies or tribunals to act in limited circumstances, it is well-established that such bodies cannot, by their own mistake of fact or law in relation to matters circumscribing the limits of their powers, give themselves powers which they do not have …

[7] That then brings us to the central question whether the activity in which the appellant was involved in was prejudicial to public order. If it is not, then habeas corpus must issue. This is because whether particular activity comes within the scope of being prejudicial to public order is a question of law upon which the Minister's view is not conclusive. It is the court that is the final arbiter upon that question. This much is made clear by the several authorities on the subject and is implicit from the leading case of *Re application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83 (affirmed on appeal in [1977] 2 MLJ 18) where Abdoolcader J said:

> The expression 'public order' is not defined anywhere but danger to human life and safety and the disturbance of public tranquillity must necessarily fall within the purview of the expression. It is used in a generic sense and is not necessarily antithetical to disorder, and is wide enough to include considerations of public safety within its signification. The Supreme Court of India exhaustively discussed the import of the term 'public order' in *Romesh Thappar v State of Madras* AIR 1950 SC 124 at p 127 (in particular, at p 127) when it established the principle that the maintenance of public order is equated with the maintenance of public tranquillity, that 'public safety' is a part of the wider concept of 'public order', that 'public safety' ordinarily means security of the public or their freedom from danger and in that sense will include the securing of public health, that is to say, anything which tends to prevent dangers to the public health may also be regarded as securing public safety.

[8] The latest pronouncement on the subject is that of the Indian Supreme Court in *Collector and District Magistrate v S Sultan* AIR 2008 SC 2096, where Dr Arjit Pasayat J said:

> The crucial issue, therefore, is whether the activities of the detenu were prejudicial to public order. While the expression 'law and order' is wider in scope inasmuch as contravention of law always affects order. 'Public order' has a narrower ambit, and public order could be affected by only such contravention which affects the community or the public at large. Public order is the even tempo of life of the community taking the country as a whole or even a specified locality. The distinction between the areas of 'law and order' and 'public order' is one of the degree and extent of the reach of the act in question on society. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of public, it could raise problem of law and order only.
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> 'Public order' is synonymous with public safety and tranquillity: 'it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State'.

A Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum, which includes at one end small disturbances and at the other the most serious and cataclysmic happenings (see *Dr Ram Manohar Lohia v State of Bihar* AIR 1966 SC 740).

'Public Order', 'law and order' and the 'security of the state' fictionally draw three concentric circles, the largest representing law and order, the next representing public order and the smallest representing security of the state. Every infraction of law must necessarily affect order, but an act affecting law and order may not necessarily also affect the public order. Likewise, an act may affect public order, but not necessarily the security of the state. The true test is not the kind, but the potentiality of the act in question. One act may affect only individuals while the other, though of a similar kind, may have such an impact that it would disturb the even tempo of the life of the community. This does not mean that there can be no overlapping, in the sense that an act cannot fall under two concepts at the same time. An act, for instance, affecting public order may have an impact that it would affect both public order and the security of the state (see *Kishori Mohan Bera v the State of West Bengal* [1972] 3 SCC 845; *Pushkar Mukherjee v State of West Bengal* 1969 (2) SCR 635; *Arun Ghosh v State of West Bengal* 1970 (3) SCR 288; *Nagendra Nath Mondal v State of West Bengal* [1972] 1 SCC 498).

[9] In support of his argument that the appellant's activity comes within the scope of 'public order' learned senior federal counsel referred us to the following passage in the judgment of Vincent Ng J (later JCA) in *Lim Thian Hok v Minister of Home Affairs & Anor and other applications* [1993] 1 MLJ 214 where he said this with reference to the jurisdictional requirement 'public order' appearing in s 4(1) of the Ordinance:

G The first limb of the section seeks to allow the Minister to detain:

(a) a person who has acted in any manner prejudicial to public order (or, presumably social order in our society), which encompasses a whole gamut of variegated offences such as smuggling, running illegal lotteries, preaching religious heresy, or advocating communist or racist ideology, all of which do not necessarily involve violence ...

[10] In *Menteri Hal Ehwal Dalam Negeri & Anor v Lee Gee Lam and another application* [1993] 3 MLJ 673; [1993] 4 CLJ 336, LC Vohrah J when delivering the judgment of the Supreme Court referred to the foregoing passage with no adverse comment. This, says learned senior federal counsel,

constitutes an affirmation by the Supreme Court that smuggling is prejudicial to public order.

[11] With respect, we are unable to accept this rather over-simplistic submission of learned senior federal counsel. The court in *Lim Thian Hock v Minister of Home Affairs & Anor and other applications* was concerned with the detention order made under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985. Hence the reference to the act of smuggling as falling within the purview of public order was wholly unnecessary to the fact pattern before the learned judge. It is a comment made in passing and without the benefit of mature argument. It is therefore pure obiter dicta and lacks even persuasive authority. As for *Lee Gee Lam*, all that the Supreme Court did was to make reference to the fact that the learned judicial commissioner whose judgment was under appeal had adopted the reasoning he had expressed in *Lim Thian Hock*. There is absent in the judgment of the Supreme Court any express approval of the proposition that the act of smuggling comes within the scope of public order.

[12] In our judgment whether an act of smuggling is prejudicial to public order depends on the facts and circumstances of each case. If it disrupts or has the potential to disrupt the even tempo of the life of the community it would prejudice public order. It would also come within the scope of public order where it disrupts or has the potential to disrupt public safety and tranquillity.

[13] The question is: does the activity engaged in by the appellant come within the foregoing test? In our judgment it does. What the appellant was engaged in was the illegal export of stolen cars. An act of smuggling stolen cars may per se not be prejudicial to public order but this is a case in which a syndicate was involved, as the grounds of detention clearly state. This activity had the effect of providing for thieves and would be thieves a ready market for the disposal of stolen cars. This has the obvious potential to disrupt public tranquillity. Because no car may be safe from being either robbed or stolen and its recovery made impossible by reason of the appellant's assistance in their disposal. There is no doubt also that the activity engaged in by the appellant had the potential to disrupt the even tempo of the life of the community. The even tempo of life of the community is disrupted when there is serious risk of loss of property through theft. It follows that a reasonable decision-maker when faced with the facts set out in the statutory statement would have concluded that the appellant's activity was prejudicial to public order. The Minister in the present instance did not therefore commit any error of law in making the order he did.

A **[14]** For the reasons already given, we are of the view that the High Court was correct in declining habeas corpus. This appeal is accordingly dismissed.

Appeal dismissed.

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Reported by Mashrifah Ravendran

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